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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 619

UNITED STATES OF AMERICA, PETITIONER

v.

YORKSHIRE INSURANCE COMPANY

No. 620

UNITED STATES OF AMERICA, PETITIONER

v.

THE HOME INSURANCE COMPANY

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, on behalf of the United States, prays that writs of certiorari issue to review the judgments of the United States Court of Appeals for the Third Circuit entered in the above-entitled cases on November 5, 1948.

OPINIONS BELOW

The United States District Court for the District of New Jersey did not write an opinion. The opinion of the United States Court of Appeals for the Third Circuit (R. 7-11, 15), is reported at 171 F. 2d 374.

JURISDICTION

The judgments of the United States Court of Appeals for the Third Circuit were entered on November 5, 1948 (R. 11, 12). A petition for rehearing, seasonably filed, was denied on December 6, 1948 (R. 15). The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Whether the prohibition of R.S. 3477 (31 U.S.C 203), against the assignment of claims against the United States may be invoked by the United States to bar recovery of judgments against it under the Federal Tort Claims Act by two insurance companies, each claiming the right by subrogation to prosecute to judgment in its own name, as the "real party in interest," a portion of the claim of the insured against the United States.

STATUTES INVOLVED

Sections 1346 (b), 1346 (c), 1402 (b), and 2674 of Title 28,[1] United States Code, and the pertinent

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[1] This action arose under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 842, which was formerly codified as 28 U.S.C. 931 *et seq.* The new Judicial Code became effective on September 1, 1948, while this action was pending on appeal, and the provisions formerly embodied

provisions of R.S. 3477 as amended, 31 U.S.C. 203, are set forth in the Appendix, *infra*, pp. 9-12.

STATEMENT

A building in Asbury Park, New Jersey, under lease to the United States, was damaged by fire on February 18, 1945 (R. 2, 3). On July 11, 1947, respondent Yorkshire Insurance Company, filed an action against the United States under the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843, in the United States District Court for the District of New Jersey, alleging that the damage to the property had resulted from the negligent refueling of an oil burner with gasoline by an enlisted man of the United States Navy acting within the scope of his employment, and that as the result of such negligence it was obliged to pay and did pay the owner, Emma R. Stuart, the sum of $3,842.06 (R. 1-2). A similar action was filed in the same court on the same day by respondent The Home Insurance Company, which alleged that it had been obliged to pay to its insured, Emma R. Stuart, the sum of $4,354.34 (R. 2-3). Each complaint sought judgment against the United States in the amount of $5,000 and costs (R. 2, 3).

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in the Federal Tort Claims Act are now distributed through various chapters of the new Code. The rights of litigants in pending actions are, of course, preserved as they were under the former law (Section 2(b) of the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess.). The citations in this petition are to the new Judicial Code, although the new code sections which are here relevant are for convenience still referred to in the aggregate as the Federal Tort Claims Act.

Neither complaint contained any allegation as to the total amount of the damage caused by the fire or the extent to which other persons are interested in the claim.

The United States moved to dismiss each complaint on the ground that the Federal Tort Claims Act does not permit suits on derivative claims and that the actions were barred by R.S. 3477, 31 U.S.C. 203 (R. 3-6). The district court heard these motions together and entered an order dismissing the complaint in each case on the ground that the Federal Tort Claims Act does not grant consent of the Government to be sued by derivative claimants (R. 6).

Each respondent appealed, and the appeals were briefed and argued together (R. 8). The United States Court of Appeals for the Third Circuit sustained the right of an insurance company subrogee to sue under the Federal Tort Claims Act, holding that the equitable rights of the insurance company in any recovery by the insured qualified it as a real party in interest under Rule 17(a) of the Federal Rules of Civil Procedure, and that the property owner and other insurers, if any, while necessary parties, are not indispensable parties[2] (R.

[2] Because the emphasis was placed on these procedural arguments on these appeals, rather than the purely substantive arguments advanced in the District Court, the Court of Appeals, being already of the opinion that the substantive arguments were not well taken, erroneously assumed that the Government was conceding the error of its substantive arguments (R. 8). A statement to this effect was included

7-11). It therefore reversed and remanded for further proceedings in the district court, stating that "if the plaintiffs can so present their case as to give the defendant the procedural protection it is entitled to, they may then have their chance to prove their case on the merits" (R. 11).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred:

1. In holding that both the insured and the insurer "own" portions of the substantive right against the tortfeasor.

2. In holding that a partial subrogee was entitled to recover judgment under the Federal Tort Claims Act against the United States in its own name as the "real party in interest" under Rule 17(a) of the Federal Rules of Civil Procedure.

3. In holding that the property owner and other insurers, if any, are not indispensable parties to an action brought by an insurance company as partial subrogee on a claim for property damage.

4. In reversing the judgments of the district court.

REASONS FOR GRANTING THE WRITS

The Government's arguments as to the availability to it of the provisions of R.S. 3477, 31 U. S. C. 203, as a bar to a suit brought by a subrogee

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in the opinion, but it was removed by amendment after the Government clarified its position in a petition for rehearing (R. 15).

under the Federal Tort Claims Act are set forth at length in the petitions filed in *United States of America* v. *Aetna Casualty and Surety Company*, No. 617, and *United States of America* v. *World Fire and Marine Insurance Company*, No. 618. The Court's attention is respectfully referred to those arguments which are fully applicable in this case. Two additional features of the general problem involved are presented herein and require brief reference.

1. The question of the right of the respondents herein to recover judgment against the United States in their own name cannot be reached without a determination that R.S. 3477 is not available to the Government as a bar to such right. Decision of this question of substantive federal law will foreclose any inquiry into the procedural status of respondents as "real parties in interest" under Rule 17(a) of the Federal Rules of Civil Procedure. To the extent that the court below in these cases relied upon Rule 17(a), without reference to the basic substantive question, to sustain respondents' right to recover judgment, the decision is clearly in error. The status of an insurance carrier as a "real party in interest" is a question of substantive law on which state statutes and decisions are in considerable conflict and confusion. Rule 17(a) can do no more than act as a means whereby this uncertainty will confront

the Government in litigation under the Federal Tort Claims Act. Again, it is clear that such a result contrasts unfavorably with the simple solution which lies in the availability to the Government of R.S. 3477.

2. In the Government's petition in *United States of America* v. *World Fire and Marine Insurance Company,* No. 618, p. we have shown that sustaining the right of an insurance company as partial subrogee to recover judgment in its own name against the United States under the Federal Tort Claims Act results in permitting single causes of action to be split and prosecuted in different districts, the venue being laid wherever the insurance company is resident or doing business. The impropriety of such a result is emphasized by the ruling of the court below in these cases that neither the insured nor any co-insurers are indispensable parties in any such action (R. 10). This holding, of course, deprives the United States of even a make-shift procedural solution to the problem of multiplicity of suits, a problem which is of easy solution if our contention as to the availability of R.S. 3477 be accepted.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for writs of certiorari should be granted.

PHILIP B. PERLMAN,
Solicitor General.

MARCH, 1949.

APPENDIX

STATUTES INVOLVED

1. Sections 1346 (b), 1346 (c), 1402 (b), and 2674 of Title 28, United States Code, as enacted by the Act of June 25, 1948, Public Law 773, 80th Cong., 2d sess. [the provisions of the above sections having been formerly embraced in Sections 410 (a) and 411 of the Federal Tort Claims Act, Act of August 2, 1946, c. 753, Title IV, 60 Stat. 843-844, as amended by the Act of August 1, 1947, c. 446, Section 1, 61 Stat. 722, 28 U. S. C. 931 (a) and 932] provide:

28 U. S. C. 1346. *United States as defendant.*

* * * * * * *

(b) Subject to the provisions of chapter 173 [3] of this title, the district courts, together with the District Court for the Territory of Alaska, the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance

[3] Apparently should read "171," since that is the number of the chapter on Tort Claims Procedure.

with the law of the place where the act or omission occurred.

(c) The jurisdiction conferred by this section includes jurisdiction of any set-off, counterclaim, or other claim or demand whatever on the part of the United States against any plaintiff commencing an action under this section.

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28 U. S. C. 1402. *United States as defendant.*

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(b) Any civil action on a tort claim against the United States under subsection (b) of section 1346 of this title may be prosecuted only in the judicial district where the plaintiff resides or wherein the act or omission complained of occurred.

28 U. S. C. 2674. *Liability of United States.*

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory

damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

2. R. S. 3477 as amended, 31 U. S. C. 203, provides in pertinent part:

31 U. S. C. 203.

All transfers and assignments made of any claim upon the United States, or of any part or share thereof, or interest therein, whether absolute or conditional, and whatever may be the consideration therefor, and all powers of attorney, orders, or other authorities for receiving payment of any such claim, or of any part or share thereof, shall be absolutely null and void, unless they are freely made and executed in the presence of at least two attesting witnesses, after the allowance of such a claim, the ascertainment of the amount due, and the issuing of a warrant for the payment thereof. Such transfers, assignments, and powers of attorney, must recite the warrant for payment, and must be acknowledged by the person making them, before an officer having authority to take acknowledgments of deeds, and shall be certified by the officer; and it must appear by the certificate that the officer, at the time of the acknowledgment, read and fully explained the transfer, assignment, or warrant of attorney to the person acknowledging the same. The provisions of this section shall not apply to payments

for rent of post-office quarters made by postmasters to duly authorized agents of the lessors.

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